

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Nova Scotia (Community Services) v. Salsman,
2007 NSSC 16

Date: 20070117
Docket: S.K. 227426
Registry: Kentville

Between:

Nova Scotia Department of Community Services,
Housing Services Division (formerly the Nova Scotia
Department of Housing and Municipal Affairs

Plaintiffs

v.

Richard Salsman and Jacqueline England

Defendants

Judge: The Honourable Justice Gregory M. Warner

Heard: Ex parte Application at Kentville, Nova Scotia

Counsel: Daniel L. Oulton, Esq., counsel for the Plaintiff

By the Court:

[1] This decision is in respect of the Mortgagee's ex parte application, filed December 20, 2006, for confirmation of a foreclosure sale, costs, a deficiency judgment and leave for an extension of time to seek a further deficiency judgment.

Background

[2] In 1982 the plaintiff granted the defendants a mortgage in the amount of \$40,500.00. Over the years there appears to have been several defaults and agreements made to reinstate the mortgage.

[3] On August 16, 2004, the plaintiff commenced an action foreclosing on the mortgage claiming the sum of \$13,783.65 plus costs. In November, 2004, it applied for an order for foreclosure and sale. On the hearing of the application in Chambers on November 18, 2004, the defendants appeared without counsel and objected to the granting of the foreclosure order. They had not filed a defence. The Court granted the defendants an adjournment to January 20, 2005, to file a defence and present written submissions. On January 20, 2005, the defendants had not filed a defence or any written submissions. The plaintiff filed a supplementary affidavit outlining all of its accounting with the defendants and was granted the foreclosure order as an uncontested foreclosure order.

[4] Apparently the property was advertized for sale and sold at public auction on March 15, 2005. Before the closing the plaintiff granted to the defendant, at the defendant's request, permission to access the property to remove the defendant's personal property. During this attendance the plaintiff states that the defendants created an oil leak and waterline break in the basement causing major environmental contamination which resulted in the sale being frustrated. The plaintiff spent approximately one year and many times the value of the mortgage cleaning up and remedying the environmental contamination. More remedial work may be required. At a second sheriff's sale on March 24, 2006, the plaintiff purchased the property. Before this application, the only documents in the file were the Originating Notice and Statement of Claim, the original application for an Order for foreclosure and Sale and a Supplementary Affidavit of the plaintiff.

This Application

[5] The plaintiff now seeks an order fixing the plaintiff's solicitor's costs, confirmation of the Sheriff's Report and the sale itself, and an order for leave to apply for a Deficiency Judgment to December 31, 2007.

Confirmation of Sale

[6] The Court has reviewed the affidavits of Daniel Oulton, Sharon Nix, James Ferris and Alain Barriault filed in respect of this application.

[7] The Court has not seen or received a Sheriff's report in respect of the "first" sale that was frustrated by the environmental contamination.

[8] Subject to receiving a Sheriff's report in regards to the first sale, the Court is prepared to grant an order confirming the steps taken pursuant to the order for foreclosure of January 27, 2005, with respect to advertizing, notice and the conduct of the sale itself.

Solicitor's Costs

[9] The plaintiff seeks costs on the basis of Tariff C of the "new" tariff. It appears to base its request on the fact that it made two Chambers appearances (November 18, 2004 and January 20, 2005), that the first sale failed to close because of the contamination caused by the defendant, that the plaintiff itself had to remedy the contamination, and a second sale was required. The plaintiff claims that these are the equivalent of one and one-half days of contested Chamber's application, entitling it to a basic fee of \$3,000.00, which it says should be multiplied by four (that is to \$12,000.00) based on the complexity of the matter.

[10] This action was commenced before September 29, 2004 and the “Old” tariff applies. The tariff that applied to uncontested foreclosures commenced before September 29, 2004, is old Tariff B1. The present tariff for uncontested foreclosures (Tariff E) does not change the minimum, medium and maximum fees; it provides that all steps to and including the obtaining of an order for foreclosure should result in a fee on Scale 1 of \$300.00, Scale 2 (the usual) \$900.00, or Scale 3, \$1,500.00. With respect to all fees subsequent to the sale, the Scale is \$650.00 (Scale 1), \$850.00 (Scale 2 or basic Scale), and \$1,500.00 (Scale 3). Notwithstanding this, fees to obtain a deficiency judgment are allowed on a Scale of \$300.00, \$500.00 or \$700.00.

Analysis Of Solicitor's Claim For Fees

[11] While no defence was filed in this action, the Court acknowledges that the appearance of the self-represented defendants at the Chambers hearing of November 18, 2004, resulted in the Court adjourning the matter and requiring a second Chambers attendance on January 20, 2005. When no defence or other written submissions were filed by the defendant in the meantime, the Court granted the plaintiff's foreclosure order as an uncontested foreclosure order.

[12] No memoranda were filed by the plaintiff with the Court with regards to any of these matters. No time records of any kind have been filed with the Court by the plaintiff in respect of these matters and it is the Court's recollection that the total time of both Court appearances was less than one hour.

[13] In other words, other than the requirements that the plaintiff's counsel attend at an extra Chambers appearance, there were no unusual aspects to this foreclosure up to and including the time of granting the foreclosure order.

[14] With regards to the events subsequent to the granting of the foreclosure order, the "unusual" events were two fold:

(a) a second sale was required when the first sale was frustrated;

(b) it appears that the plaintiff carried out extensive environmental remedial work in the year subsequent to the aborted first sale.

[15] The Court notes that there were no records of what, if anything, was required of the plaintiff's counsel in respect of these two additional steps required of the plaintiff. No sheriff's report was prepared or filed with the Court with regards to the first (frustrated) sale. No time records have been filed by plaintiff's counsel with regards to any work he carried out, nor any justification as to whether it was necessary or reasonable.

[16] The foreclosure was in fact an uncontested foreclosure action. The Court acknowledges that there was some more involvement than the normal foreclosure for which the basic, or Scale 2, fees are permitted.

[17] Pursuant to Civil Procedure Rule 63, costs are in the discretion of the Court, which discretion must be exercised judicially.

[18] Relevant factors in determining fair solicitor's costs is the fact that the appearance of the defendant caused the plaintiff to appear a second time at Chambers, and the apparent oil spill caused by the defendant required the plaintiff's counsel to arrange for a second sale.

[19] The size of the claim (\$13,800.00), and the absence of any complicated legal issue, including no extra Chambers applications or additional documents or briefs being filed, are also factors.

[20] In my view, Scale 3 of Tariff E (which was Scale 5 in old Tariff B1) exists for circumstances such as this. With regards to the steps taken up to and including the obtaining of the foreclosure order, the basic Scale 2 fee of \$900.00 can be raised to \$1,500.00 to consider the extra Chambers appearance. With respect to all of the steps subsequent to the foreclosure order, that is in this case the holding of a second sale, the increasing of the fees from \$850.00 (Scale 2), to \$1,500.00 (Scale 3), allows for any additional work.

[21] In my view, Scale 3 of Tariff E provides reasonable reimbursement for the plaintiff's solicitor's additional legal steps in the circumstances, keeping in mind the size of the mortgage being foreclosed upon.

Disbursements

[22] The plaintiff seeks approval of its legal disbursements but not at this time the disbursements in relation to the environment remedial work.

[23] The practice before the Court in the past, and the provisions of the current Practice Memorandum 13, beginning at section 3.3, allow the Court to approve disbursements which have been proven by evidence to have been authorized by the mortgage, necessarily expended, and reasonable. Evidence is usually in the form of affidavit showing receipts and/or invoices.

[24] If the Court receives evidence it will consider the claim for disbursements.

Leave to Apply For Deficiency Judgment

[25] Civil Procedure Rule 47.10(3) requires applications for deficiency judgment to be made within six months of the sale. The Court of Appeal in *Royal Bank v. Phillips* (1994) 133 N.S.R.(2d) 232, sets out fairly stringent conditions to be met before an extension of time will be granted.

[26] The plaintiff only seeks an extension of time to apply for a deficiency in respect of the environmental remedial work. The affidavits filed state that the remedial work was carried out in 2005 with ongoing water analysis in the spring and fall of 2006. The affidavit of Mr. Barriault suggests that the Nova Scotia Department of Environment and Labour will issue a certificate of compliance in the spring of 2007. In view of the length of time since the last sale (nine months ago), an extension to December 31, 2007, has not been shown to be reasonable or necessary. With respect to a claim for deficiency judgment in respect of environmental clean up costs, the Court is prepared to consider an extension to June 29, 2007.

[27] No application has been made for leave to apply for a deficiency judgment in respect of any shortfall with respect to the sale or value of the property, or in respect of legal fees and legal disbursements, despite the fact that the sale took place nine months previous to this application. The Court would entertain an application for leave to apply for deficiency judgment in respect of non-remedial work if made within thirty days of the date of this decision.

J.